



April 14, 1999

Ms. Belinda Perkins  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR99-1020

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 123402.

The Teacher Retirement System of Texas (the "System") received a request for information submitted by two companies in response to a request for a specified System contract, as well as "a list of the board members for TRS-Care together with their addresses." In response to the request, you submit to this office for review the records that the companies "consider confidential along with the remaining portions of the contracts." You state that "portions" of the requested information, which you have marked, "have been released to the requestor." However, you also contend that "[a]ll or portions of the enclosed documents may be excepted from disclosure," pursuant to sections 552.101 and 552.110 of the Government Code.<sup>1</sup> We have considered the exceptions and arguments you have raised and have reviewed the submitted information.

Pursuant to section 552.305 of the Government Code, we notified Aetna U.S. Healthcare ("Aetna") and Merck-Medco Managed Care, L.L.C. ("Merck-Medco") of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision

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<sup>1</sup>We assume that any other responsive information, to the extent it exists, will be provided to the requestor, since you have not raised any other exceptions. If a government employee has complied with section 552.024, then section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. *See* Gov't Code § 552.352 (distribution of confidential information is criminal offense).

No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information.

Upon notification of the open records request, Aetna submitted a letter to the System asserting that the company is "agreeable to TRS producing the ASC Contract between TRS and Aetna Life Insurance Company dated 9/1/97, GSC-50, but excluding Appendix II and III." In Aetna's letter to the System, however, the company summarily contends that the records at issue contain "proprietary and confidential" information, including "sensitive pricing material." However, Aetna did not respond to our notification. Merck-Medco responded to our notification and asserted that "[u]nder Section 9 of the Agreement, Merck-Medco and TRS have agreed not to disclose the terms of the agreements, which are agreed to be confidential."<sup>2</sup> Specifically, Merck-Medco contends that sections 3.2, 6.2, 6.3 and schedules B and C are "confidential, proprietary, competitive and/or trade secrets" protected from disclosure under sections 552.101, 552.104,<sup>3</sup> and 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>4</sup> Since only Merck-Medco raised the trade

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<sup>2</sup>We note that information is not confidential under the act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

<sup>3</sup>Section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the government's interest in purchasing by assuring that the bidding process will be truly competitive. *See* Open Records Decision Nos. 583 (1990), 554 (1990). Therefore, you may not withhold the requested information under section 552.104.

<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in

secret prong we have considered their arguments in support of this prong. However, Merck-Medco did not provide facts sufficient to show the applicability of the necessary factors. *See* Open Records Decision No. 363 (1983) (third party's duty to establish how and why exception protects particular information). Therefore, the requested information concerning Merck-Medco is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue, submitted by Aetna and Merck-Medco, constitutes confidential "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

To be held confidential under *National Parks*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. A business enterprise cannot succeed in a *National Parks* claim by a *mere conclusory* assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted); *see* Open Records Decision No. 639 (1996). Aetna's letter to the System summarily asserts that its records "are proprietary and therefore confidential as they include sensitive pricing material." Merck-Medco responded to our notification with conclusory arguments that portions of the information at issue are excepted from disclosure under section 552.110 as "trade secret or commercial information." Neither Aetna nor Merck-Medco has sufficiently established

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developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

that releasing the requested information would likely cause them to suffer substantial competitive injury. Therefore, we conclude that the requested information is not excepted from disclosure pursuant to section 552.110.

Finally, we consider whether section 552.101, which was raised by Merck-Medco, excepts any of its submitted information. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We have examined the submitted information and we are not aware of any law that makes the requested information confidential, nor does Merck-Medco raise any such statute.<sup>5</sup> Accordingly, we conclude the System may not withhold any portion of the submitted information based on section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad", with a large, stylized initial "S" that loops around the first part of the name.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/nc

Ref.: ID# 123402

Encl: Submitted documents

cc: Mr. C.J. Andrews  
1309 Southwood Boulevard  
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(w/o enclosures)

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<sup>5</sup>Corporations do not have a protected common-law privacy interest. Open Records Decision Nos. 620 (1993), 192 (1978).

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